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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1980

LILY DALE ASSEMBLY,

Petitioner,

v.

GREGORY D. JOSEPHSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRUCE K. CARPENTER
WOODIN & CARPENTER
P. O. Box 140
Jamestown, New York 14701

Counsel for Petitioner

May 12, 1981

QUESTION PRESENTED FOR REVIEW.

Whether the state under its tax foreclosure statutes may deprive a landowner of property for non-payment of taxes (when the identity and address of the owner have been a matter of longstanding public record) without giving any notice to the owner by name, of the tax sale proceedings or of the owner's statutory right to redeem.

TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Reports and Opinions Below	2
Jurisdiction of United States Supreme Court	2
Question Presented for Review	2
Constitutional Provisions and Statutes	3
Statement of the Case	7
Reasons for Allowance of the Writ	10
Conclusion	12
APPENDICES	
Decision of Chautauqua Supreme Court (Ricotta, J.)	A-1
Memorandum Decision of New York Appellate Division, Fourth Judicial Department, *Lily Dale Assembly v. County of Chautauqua*, 72 AD2d 950	A-5
Memorandum Decision of New York Court of Appeals, *Lily Dale Assembly v. Josephson*, 52 NY2d 943	A-9
Judgment of New York Court of Appeals	A-12
Additional Statutes Involved	A-13

TABLE OF AUTHORITIES

Cases	Page
Ballard v. *Hunter*, 204 U.S. 241	8
Botens v. *Aronauer*, 32 NY2d 243	8
Covey v. *Somers*, 351 U.S. 141	10
Fuentes v. *Shevin*, 407 U.S. 67	10
Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358	8
Lily Dale Assembly v. *County of Chautauqua*, 72 AD2d 950, 422 N.Y.S. 2d 239	2, 8
Lily Dale Assembly v. *Josephson*, 52 NY2d 943	2, 9
Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U.S. 313.	8
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306	10, 11, 12
Nelson v. *New York*, 352 U.S. 103	10
New York v. *New York, New Haven & Hartford R. Co.*	10
Paschall v. *Christie-Stewart*, 414 U.S. 100	10
Robinson v. *Hanrahan*, 409 U.S. 38	10
Saunders v. *Shaw*, 244 U.S. 317	8
Schroeder v. *New York*, 371 U.S. 208	8, 10
Walker v. *Hutchinson*, 352 U.S. 112	10
Wisconsin Elec. Power Co. v. *City of Milwaukee*, 352 U.S. 948	10

Page

Other Authorities:

New York, Laws of 1975, ch. 611 6

New York Real Property Tax Law:

§500 ..... 3, 7
§502 3
§504 ..... 3, 9
§1002 ..... 1, 3, 7, 8
§1014 ..... 1, 4, 7, 8

28 U.S.C. §1257(3) 2

United States Constitution, Fourteenth Amendment ... 3, 9, 10

In The

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OCTOBER TERM, 1980

No. _____

LILY DALE ASSEMBLY,

Petitioner,[1]

v.

GREGORY D. JOSEPHSON,

Respondent.[2]

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner Lily Dale Assembly respectfully prays that a writ of certiorari issue to review the judgment or decree of the New York Court of Appeals, entered in this proceeding on February 12, 1981.

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[1]The petitioner Lily Dale Assembly has been organized under the New York Not-for-Profit Corporations Law. It has no parent companies or subsidiaries. Its purpose is the furtherance of the religion of Spiritualism and it is affiliated with the National Spiritualist Association.

[2]At the trial level in the State of New York, the County of Chautauqua was a defendant, but it did not join or appear in the appeal to the New York Appellate Division or to the New York Court of Appeals. Since the petitioner challenged the constitutionality of New York Real Property Tax Law, §§1002 and 1014, the New York Attorney General appeared in this action and filed a brief in the New York Court of Appeals.

REPORTS AND OPINIONS BELOW.

The opinion delivered by the trial court, which granted summary judgment in favor of the petitioner, has not been reported.[3] The Appellate Division of the New York Supreme Court, Fourth Judicial Department, by a divided court delivered a memorandum decision of reversal on November 16, 1979 (*Lily Dale Assembly* v. *County of Chautauqua*, 72 AD2d 950, 422 N.Y.S.2d 239).[4] The New York Court of Appeals affirmed the order of the Appellate Division, *sub nom. Lily Dale Assembly* v. *Josephson*, 52 NY2d 943, ___ N.Y.S.2d ___; ___ N.E.2d ___.[5]

JURISDICTION OF UNITED STATES SUPREME COURT.

The judgment or decree of the New York Court of Appeals was entered on February 12, 1981, and this petition for certiorari is being filed within 90 days of that date. No order respecting any rehearing has been had, nor any extension of time within which to petition for certiorari. The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment or decree is 28 U.S.C. §1257(3). The validity of New York State statutes is drawn in question on the ground of being repugnant to the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW.

Whether the state under its tax foreclosure statutes may deprive a landowner of property for non-payment of taxes (when

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[3]This opinion, by Hon. Joseph J. Ricotta, Chautauqua County, New York, Supreme Court, was delivered on February 2, 1978, and is printed at pp. A1-A4, below.

[4]The memorandum decision and dissenting memorandum in the Appellate Division are printed at pp. A5-A8, below.

[5]The memorandum of the New York Court of Appeals is printed at p. A9-A11, and the order of affirmance at p. A12, below.

the identity and address of the owner have been a matter of longstanding public record) without giving any notice to the owner by name, of the tax sale proceedings or of the owner's statutory right to redeem.

CONSTITUTIONAL PROVISIONS AND STATUTES.

UNITED STATES CONSTITUTION

AMENDMENT 14

Section 1. *Citizens of the United States*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

NEW YORK REAL PROPERTY TAX LAW

[The language is that effective at the times involved in this proceeding].

§ 500. *Ascertainment of facts for assessment.*

On or before the first day of May in each year, the assessors in each city and town shall ascertain by diligent inquiry all the real property located therein and the names of the owners thereof.

§ 502. *Form of assessment roll,* Printed in appendix, p. A13-A14, below.

§ 504. *Preparation of assessment roll.* Printed in appendix, p. A14-A15, below.

§ 1002. *Notice of Sale*

1. The county treasurer shall at the time specified in section ten hundred of this chapter for the commencement of tax sale proceedings in his county, cause a notice of tax sale to be published at least once in each week for six weeks in two newspapers designated for the publication of the concurrent resolutions specifying a day at the expiration of the six weeks on which the sale will commence at the courthouse of the county.

2. Such notice shall contain a list of the parcels to be sold giving a brief description of each, the name of the owner or occupant thereof as the same appears on the tax roll and the aggregate amount due on each parcel as of the time of sale. Such amount shall include the unpaid taxes for the year advertised including the five per centum added pursuant to section nine hundred thirty-six of this chapter, interest thereon at the rate of ten per centum per annum from the first day of February after levy of the tax and the expense chargeable against the parcel. No error with respect to a parcel in any list shall render the sale void or in any manner affect the validity thereof except as to the effect, if any, on the particular parcel in repect to which such error occurred.

3. Proof of the publication of the notice shall be filed in the office of the county treasurer and in the office of the county clerk within twenty days after the last publication. The charges for publishing such notice shall not be paid until such proof has been filed. Such charges shall be at the rate specified in section fifteen hundred fifty-one of the civil practice act.

§ 1014. *Notice of unredeemed lands*

1. The county treasurer shall, at least three months before the expiration of the one year allowed for the redemption of lands sold by him for taxes, cause commencement of publication of a notice once a week for six successive weeks in the newspapers designated by the board of supervisors of the county for the publication of concurrent resolutions, such notice to contain a list of the lands in the county sold for taxes and unredeemed, specifying particularly every parcel unredeemed, the amount

necessary to redeem the same computed to the last day in which such redempion can be made and stating that unless such lands are redeemed on or before such day they will be conveyed to the purchaser.

2. If more than two newspapers in any county are designated pursuant to law to publish the concurrent resolutions, publication shall be made in any two of such newspapers selected by the board of supervisors.

3. Proof of the publication of the notice shall be filed in the office of the county treasurer and in the office of the county clerk within twenty days after the last publication.

4. The expense of publishing the notice shall be apportioned by the county treasurer among the several parcels included therein. Such expense shall be at the same rate as that provided by law for the publication of notices pursuant to the civil practice law and rules and shall in the first instance be a county charge. The amount so apportioned to any parcel, together with interest thereon at the rate of ten per centum per annum from the date of payment of such expense by the county, shall be paid to the county treasurer by the purchaser at the tax sale or other person entitled to a conveyance upon the execution of the conveyance to him.

5. If a parcel is redeemend subsequent to incurring the expense of publication of the notice and before issuance of a deed, the person redeeming shall pay to the county treasurer, in addition to the other amounts required for redemption, the expense of publishing the notice with interest thereon at the rate of ten per centum per annum from the date of payment of such expense by the county. If a parcel is redeemed after the issuance of a deed, the person redeeming shall pay to the county treasurer for the use of the grantee, or those claiming under him, in addition to the other amounts required for redemption, the expense of publishing the notice with interest thereon at the rate of ten per centum per annum from the date of payment of such expense by the county. If a parcel of land is bid in by the county and is

not redeemed, the expense of publishing the notice shall be a county charge.

6. If a parcel of real property is not redeemed within the time prescribed by law, and the period within which the tax sale purchaser, or those claiming under him, is entitled to a deed has expired, the share of the expense of the publication of the notice apportioned to such parcel by the county treasurer, with interest thereon at the rate of ten per centum per annum from the date of payment of such expense by the county, shall be levied by the board of supervisors against such parcel at the time of the next general tax levy, in the same manner and with the same effect as a levy of taxes. Any money received by a county treasurer pursuant to this section shall be paid into the general fund of the county.

[By N.Y. L. 1975, ch. 611, §§ 1002 and 1014 were amended. Only the amendment to § 1014 affected this proceeding. New subdivisions 7 and 8 were added.]

7. The county treasurer shall also, at least three months before the expiration of the time allowed for the redemption of lands sold by him for taxes, cause notice to be sent by certified mail,* return receipt requested, to the owner or occupant of each parcel to be conveyed as the name appears on the tax roll. Such notice shall contain a description of the parcel in the county sold for taxes and unredeemed, specifying the amount necessary to redeem the same computed to the last day in which such redemption can be made and stating that unless such parcel is redeemed on or before such day it will be conveyed to the purchaser. The expense of such mailing shall be in addition to the other amounts required for redemption. If the parcel is not redeemed within the time prescribed by law, and the period within which the tax sale purchaser, or those claiming under

*A later amendment removed the requirement that the mailing be certified, substituting first class mail.

him, is entitled to a deed has expired, the expense of mailing such notice on each parcel shall be levied by the county against such parcel at the time of the next general tax levy in the same manner and with the same effect as a levy of taxes.

8. Proof of mailing of the notice shall be filed in the office of the county treasurer and in the office of the county clerk within twenty days after return of the receipt or return of the mailing as undeliverable or unaccepted.

STATEMENT OF THE CASE.

In 1910 a deed was recorded in the office of the Chautauqua County Clerk, granting land to "Lily Dale Assembly (a Corporation) of Lily Dale, New York". The lot in question, a small part of that conveyed by the 1910 deed, did not appear on the tax assessment rolls until 1974, when it was listed "owner unknown". For failure to pay the 1974 tax of $35.96 the property of the petitioner was sold to the county in 1975, and in 1977 the county conveyed the lot to the respondent Gregory D. Josephson. This lot is especially important to the petitioner, because a sewer outfall runs through it.

No notices of the tax sale (under N.Y. Real Property Tax Law, § 1002) or of the owner's right to redeem (under § 1014) were given to the petitioner by mail, and the published notices listed the lot (as on the assessment roll) "owner unknown". No other notice was attempted.

The petitioner began in the Chautauqua County Supreme Court an action to quiet title. The court (Hon. Joseph J. Ricotta) ruled in favor of the petitioner, holding that, had proper procedures and safeguards been followed under the New York statutes, the ownership by the petitioner would have been discovered and it would have been advised of the tax levy and notice (citing particularly N.Y. Real Property Tax Law, § 500: "... the assessors in each city and town shall ascertain by

diligent inquiry all the real property located therein and the names of the owners thereof"):

> "... The Court, therefore, feels very strongly that before the record title holder of real property may be divested of his interest for non-payment of taxes, all the necessary requirements of due process, including notice to said party, must be met by the taxing authorities before there can be a lawful divestment. The bidding by the plaintiff on the premises in question does not cure the defect of notice. See *Schroeder* v. *City of New York*, 371 US 208 ..." (Decision of Chautauqua Supreme Court of February 1, 1978; printed below, pp. A1-A4, at A3).

The respondent appealed to the Appellate Division, Fourth Judicial Department, which by a divided court reversed and granted summary judgment to the respondent:

> "... No constitutional due process requirement mandates personal notice (see *Ballard v. Hunter*, 204 US 241, 254-255; *Botens v. Aronauer*, 32 NY 2d 243), and if there is such a requirement, it must be found in the statute itself. The simple answer is that subdivision 4 of section 1002 [N.Y. Real Property Tax Law] provides only that notice be sent to 'the owner or occupant, *as shown on the assessment roll*' (emphasis added; see also Real Property Tax Law, § 1014, subd 3). In this case the roll listed the owner as 'unknown' and the statute imposes no additional duty on the assessors to investigate or determine ownership...." (*Lily Dale Assembly* v. *County of Chautauqua*, 72 AD2d 950, 951-952; 422 N.Y.S. 2d 239, 240-241; printed below at pp. A5-A8, at A7).

The petitioner, accordingly, was faced with the necessity of raising the federal constitutional question only after the Appellate Division reversal with its unanticipated denial of the petitioner's Fourteenth Amendment rights.[6] The issue con-

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[6]See *Saunders* v. *Shaw*, 244 U.S. 317, 320; *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 367; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320.

cerning deprivation of the petitioner's property without due process of law, arising from the inadequate notice of the tax sale and of the right to redeem, was thoroughly briefed and argued in the New York Court of Appeals.[7]

The Court of Appeals affirmed "for the reasons stated in the memorandum at the Appellate Division . . .", citing in addition N.Y. Real Property Tax Law, § 504, subd 4.[8] [*Lily Dale Assembly* v. *Josephson*, 52 NY2d 943, ____ N.Y.S.2d ____, ____ NE2d ____, printed at pp. A9-A11, below).

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[7]The New York Attorney General filed a brief defending the constitutionality of the New York statutes.

[8]This statute deals with the preparation of assessment rolls, and by subdivision 4 it provides that an error or omission in failing to enter the name of the owner shall not prevent the levy, collection and enforcement of payment of taxes, if the parcel can be identified and located with reasonable certainty. See the appendix, A14, below.

REASONS FOR ALLOWANCE OF THE WRIT

The New York Court of Appeals has decided a federal question of substance in a way not in accord with applicable decisions of this Court. This Court has consistently held that the Due Process Clause requires that governmental deprivation of life, liberty or property be preceeded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (involving notice to beneficiaries of a trust); *Schroeder* v. *New York*, 371 U.S. 208, 212 (involving notice of diversion of a river); *Walker* v. *Hutchinson*, 352 U.S. 112, 115 (involving notice to landowner in street condemnation); *New York* v. *New York, New Haven & Hartford R. Co.* 344, U.S. 293, 296 (notice to city of barring of tax lien); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (involving requirement of prior notice in replevin); *Robinson* v. *Hanrahan*, 409 U.S. 38, 39 (involving notice to accused of automobile forfeiture).

Although real property tax foreclosure proceedings are common in all the states, there are very few decisions of this Court involving the kind of notice that will accord due process in a tax sale. See *Covey* v. *Somers*, 351 U.S. 141, 146 (involving notice to an landowner known to be mentally incompetent).

In *Paschall* v. *Christie-Stewart*, 414 U.S. 100, probable jurisdiction had been noted to consider whether the published notice provisions of Oklahoma tax sale statutes comported with due process of law, but the judgment of the Supreme Court of Oklahoma was vacated and the case remanded to consider whether a statute of limitations issue was an independent bar to the appellants' claim. Notice required in tax assessment proceedings was considered in *Wisconsin Elec. Power Co.* v. *City of Milwaukee*, 352 U.S. 948, 958 (see the case on remand, 275 Wis. 121, 123; 81 N.W.2d 298). See also *Nelson* v. *New York*, 352 U.S. 103, 105, involving foreclosure for non-payment of water charges, in which mailed notice of the proceedings had been received by the landowner's agent.

No claim is made that the *tax* was in any way invalid, nor that collection of the tax might be enforced in ways other than by confiscation. No claim is made now, nor was it ever made below, that *personal* service was necessary. Effective notice under the circumstances could have been accomplished (as the Chautauqua Supreme Court ruled) by mailing the notice to the petitioner and by including the petitioner's name in the published notices.

The *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, as in the present case, ineffective published notice was defended on the ground that the proceeding was *in rem*. The Court held that the requirements of the Fourteenth Amendment:

> ". . . do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state . . . Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require the deprivation of life, liberty or property by adjudication be preceeded by notice and opportunity for hearing appropriate to the nature of the case . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the tendancy of the action and afford them an opportunity to present their objections". (339 U.S. 306, 312, 313, 314).

The Court also stated in the *Mullane* case

> ". . . But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it . . . . It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of

> notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its efficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint." (339 U.S. 306, 315).

In the present case, although the New York Court of Appeals might have decided (as did the Chautauqua Supreme Court) that a proper application of the statutes would have led to effective notice to the landowner of the impending loss of its land, the actual decision has resulted in a deprivation of property without due process of law. If, as the New York Court of Appeals necessarily ruled, the New York statutes permitted the deprivation, then the statutes are invalid. Effective notice was the landowner's due — even by mail or by publication (using the landowner's name and address, which were for over 60 years a matter of public record).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment or decree of the New York Court of Appeals.

Respectfully submitted,

BRUCE K. CARPENTER
WOODIN & CARPENTER
P. O. Box 140
Jamestown, New York 14701

Counsel for Petitioner

May 12, 1981

APPENDICES

DECISION OF CHAUTAUQUA SUPREME COURT (RICOTTA, J.)

STATE OF NEW YORK
SUPREME COURT – COUNTY OF CHAUTAUQUA

LILY DALE ASSEMBLY, INC.
5 Melrose Park
Lily Dale, New York,

Plaintiff,

vs.

THE COUNTY OF CHAUTAUQUA
Mayville, New York,

and

GREGORY D. JOSEPHSON
15 North Shore Park
Cassadaga, New York,

Defendants.

AULAR & WOODBURY
(William B. Aular, Esq. *of Counsel)*
for Plaintiff

EDWIN J. KUZDALE, ESQ.
for Defendant County of Chautauqua

ERICKSON, WEBB & SCOLTON
for Defendant Gregory D. Josephson

MEMORANDUM

RICOTTA, J.

This is a motion brought by the plaintiff seeking summary judgment pursuant to CPLR §3212 on the grounds that there are

no triable issues of fact and no defense to the cause of action asserted in the complaint.

Plaintiff is seeking to set aside a deed dated July 8, 1977, wherein Chautauqua County conveyed to the defendant, Gregory D. Josephson, certain premises in the Village of Cassadaga and to further determine that the plaintiff is the true and lawful owner thereof.

According to the papers filed herein a deed was recorded in the Chautauqua County Clerk's Office on September 10, 1910 in Liber 365 of Deeds at page 47, wherein the premises in question were conveyed to the plaintiff.

That subsequent thereto and in the year 1975, the deed in question was given to the defendant, Gregory D. Josephson, pursuant to a tax deed issued by the defendant, County of Chautauqua for the year 1974 for non-payment of taxes. The premises in question were assessed to unknown persons on the tax roll that was prepared by the County of Chautauqua Tax Assessors and the tax bills for the years in question were never mailed to anyone.

Plaintiff was a bidder on the said tax sale as was the defendant, Gregory D. Josephson, who was the successful bidder.

The plaintiff contends that he was never notified of the taxes that were assessed on said premises and that the County of Chautauqua did not properly assess the premises in that they failed to notify the plaintiff who was the record owner at the time of the new assessment.

This court, upon reading all the papers herein, finds that the defendant, County of Chautauqua, did not in fact properly search title to the premises in question. Had the tax assessors properly performed their duty they would have discovered that

the plaintiff, Lily Dale Assembly, Inc., was the true and lawful owner of said premises and should have been advised of the tax levy. See §500 of the Real Property Tax Law.

Further, the County of Chautauqua has not complied with §1002(4) of the Real Property Tax Law dealing with Public Notice of Sale. This notice must be sent by first class mail to the name and address or [sic] the occupant as shown on the assessor's roll of the parcel to be sold. This section was not complied with in that the assessors never did list the record owner nor was any notice ever mailed to the plaintiff whatsoever. See *Wallace* v. *McEchron*, 176 N Y 424.

The Court, therefore, feels very strongly that before the record title holder of real property may be divested of his interest for non-payment of taxes, all the necessary requirements of due process, including notice to said party, must be met by the taxing authorities before there can be a lawful divestment. The bidding by the plaintiff on the premises in question does not cure the defect of notice. See *Schroeder* v. *City of New York*, 371 US 208.

The proper procedures and safeguards were not followed in this case. Therefore, pursuant to §1026 of the Real Property Tax Law this Court is ordering the cancellation of the sale by the Chautauqua County Treasurer herein and decrees that said deed to Gregory D. Josephson be declared null and void. Title is to remain vested in the plaintiff, Lily Dale Assembly, Inc., who is the true and lawful owner of said premises.

This decision is in no way to impede or deny the right of the County of Chautauqua from collecting and levying future taxes on said premises inasmuch as the true owner is now known and the assessors can properly list the premises on the tax rolls.

Submit order accordingly,

No costs to either party.

Dated: February 2, 1978
Buffalo, New York

/s/ JOSEPH J. RICOTTA
Joseph J. Ricotta
Justice of Supreme Court

MEMORANDUM DECISION OF NEW YORK APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT, *Lily Dale Assembly* v. *County of Chautauqua*, 72 AD2d 950.

Lily Dale Assembly, Inc., Respondent, v. County of Chautauqua, Defendant, and Gregory D. Josephson, Appellant. — Judgment and order reversed, with costs, plaintiff's motion denied and summary judgment granted defendant. Memorandum: Plaintiff brings this action pursuant to article 15 of the Real Property Actions and Proceedings Law to determine claims to real property conveyed to it in 1910. Defendant Josephson claims title as a result of a 1977 tax deed from defendant county. Plaintiff contends that the sale, regular in all other respects, is void because it did not receive prior written notice as required by subdivision 4 of section 1002 of the Real Property Tax Law which provides that before publishing notice of the intended sale of tax parcels, the county treasurer shall "cause notice of such tax sale to be sent by first class mail to the name and address of the owner or occupant, as shown on the assessment roll, of each parcel to be sold." Concededly, such notice was not sent because the assessors did not know who owned the property. Special Term held that the assessors had a duty to "diligently inquire" into the identity of the owner, that their failure to determine the owner was unexcused, and that the want of personal notice to plaintiff made the sale jurisdictionally defective (see Real Property Tax Law, §500). It granted plaintiff summary judgment vacating the sale. The real property in question is an unoccupied one-quarter acre parcel located on the shores of Cassadaga Lake. For several years it has been described by reference to tax maps as section 102 (Block 10, Lot No. 2) in the Town of Stockton, Chautauqua County. It is immediately south and adjacent to a much larger 20-acre parcel (section 102, Block 10, Lot No. 1) belonging to plaintiff Lily Dale Assembly, Inc. Plaintiff acquired both parcels by a single grant in 1910, the lot in question being described in a separate paragraph of the premises conveyed as described in the deed. The

parties concede that up to this tax sale plaintiff was the owner of the land in question. For many years the assessors did not list on the tax rolls parcels whose owners were unknown and no taxes were levied against Lot No. 2. In 1974, for the first time, the property was listed "owner unknown." The taxes were not paid and in 1975 the county bought the lot. In 1977 it conveyed it to defendant. Plaintiff bid at the sale (although apparently unaware it held record title to the parcel) but was unsuccessful. The statutory duty of preparing the assessment rolls is placed upon the town and city assessors (Real Property Tax Law, §500). They are charged with the responsibility of ascertaining by "diligent inquiry" all the real property in the district and the names of the owners thereof to the end that all property shall share the burden of the tax levy. Once identified, each parcel of property is placed upon the assessment roll with its assessment listed. The tax is levied against the real property itself, not the owner (Real Property Tax Law, §304, subd 1). The land stands as security for the tax debt and upon default in payment collection is by proceedings in rem against the property. Since the tax is levied upon the property, it is the identification of the property on the roll that is important, not the name of the owner. Ownership is only one part of the identification and absent a description so imperfect that identification of the property with any degree of certainty is impossible, error or omission in identifying the owner does not invalidate the levy or enforcement proceedings (Real Property Tax Law, §504, subd 4; *Matter of Doughty v. Loomis*, 9 AD2d 574, affd 8 NY2d 722; *Crockford v. Zecher*, 74 Misc 2d 1067, 1069, affd 45 AD2d 914; see, also, *People ex rel. Gale v. Tax Comm. of City of N.Y.*, 17 AD2d 225, 227). Indeed, the statute provides that the property may be listed in the name of the owner, last owner, or reputed owner (Real Property Tax Law, §502, subd 2) and identification may be made, as was done here, by reference to a tax map (Real Property Tax Law, §502, subd 2). Notwithstanding these well-

established rules, Special Term applied the "diligent inquiry" language of section 500 to the recently enacted provisions of subdivision 4 of section 1002 of the Real Property Tax Law and held the county's sale to defendant void for want of personal notice to plaintiff. No constitutional due process requirement mandates personal notice (see *Ballard v. Hunter*, 204 US 241, 254-255; *Botens v. Aronauer*, 32 NY2d 243), and if there is such a requirement, it must be found in the statute itself. The simple answer is that subdivision 4 of section 1002 provides only that notice be sent to "the owner or occupant, *as shown on the assessment roll*" (emphasis added; see, also, Real Property Tax Law, §1014, subd 3). In this case the roll listed the owner as "unknown" and the statute imposes no additional duty on the assessors to investigate or determine ownership. This case illustrates just how onerous any such an obligation would be. Inquiry of the properties bordering this vacant land would be unavailing. Plaintiff itself occupied the land adjacent and it was unaware of its ownership. Thus, the assessors would have had to search real property records for 65 years before the grant to plaintiff could be discovered. Plaintiff can hardly fault the tax assessor for not discovering the true owner of the property and failing to give personal written notice to it when plaintiff itself was unaware of ownership after holding title to it for 65 years and occupying it with underground utility lines part of that time. Defendant did not cross-move for summary judgment on its counterclaim but in the affidavits responding to plaintiff's motion, it requested summary judgment relief, and since no question of fact has been raised and no other irregularity in the tax proceedings is claimed, we grant its application (CPLR 3212, subd [b]; see *Wiseman v. Knaus*, 24 AD2d 869). All concur, except Callahan, J., who dissents and votes to affirm, in the following memorandum.

Callahan, J. (dissenting). Section 500 of the Real Property Tax Law imposes a duty to ascertain the rightful owner of real

property within the county. While subdivision 4 of section 504 of the Real Property Tax Law excuses an error in listing the name on the tax assessment roll, it does not purport to nullify section 500. It is still the law in New York that strict compliance with the prerequisites for a tax sale is required because of the seriousness of divesting a person of his property (see *London v. Hammel*, 27 NY2d 630; *Wiesniewski v. Basinait*, 59 AD2d 1028; *Burden v. Max-Mor Dev. Co.*, 53 AD2d 1047). The record is devoid of evidence that the county ever made any search to ascertain the proper owner. The rightful owner has always been ascertainable with diligent inquiry as the deed to Lily Dale was properly recorded in 1910. Accordingly, I would affirm for the reasons specified at Special Term, Chautauqua County, Ricotta, J. (Appeal from judgment and order of Chautauqua Supreme Court — Real Property Actions and Proceedings Law, art 15.) Present — Simons, J.P., Hancock, Jr., Callahan, Doerr and Moule, JJ.

MEMORANDUM DECISION OF NEW YORK COURT OF APPEALS, *Lily Dale Assembly* v. *Josephson*, 52 NY2d 943.

LILY DALE ASSEMBLY, INC., Appellant, v. COUNTY OF CHAUTAUQUA, Defendant, and GREGORY D. JOSEPHSON, Respondent.

Argued January 13, 1981; decided February 12, 1981

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered November 16, 1979, which (1) reversed an order and judgment of the Supreme Court at Special Term (JOSEPH J. RICOTTA, J.), entered in Chautauqua County, granting the plaintiff's motion for summary judgment, ordering cancellation of a certain tax sale and declaring that the tax sale deed to defendant was null and void and title to the realty involved is to remain vested in the plaintiff, (2) denied plaintiff's motion for summary judgment, and (3) granted summary judgment to defendant. In an action pursuant to article 15 of the Real Property Actions and Proceedings Law to determine claims to real property conveyed to plaintiff in 1910, defendant Josephson claims title as a result of a 1977 tax deed from defendant county, while plaintiff contends that the sale, regular in all other respects, is void because it did not receive prior written notice as required by subdivision 4 of section 1002 of the Real Property Tax Law which provides that before publishing notice of the intended sale of tax parcels, the county treasurer shall "cause" notice of such tax sale to be sent by first class mail to the name and address of the owner or occupant, as shown on the assessment roll, of each parcel to be sold". Such notice was not sent because the assessors did not know who owned the property. The real property in question, an unoccupied one-quarter acre parcel located on the shores of Cassadaga Lake, has for several years been described by reference to tax maps as section 102 (Block 10, Lot No. 2) in the Town of Stockton, Chautauqua County. It is adjacent to a much

larger 20-acre parcel (section 102, Block 10, Lot No. 1) belonging to plaintiff. Both parcels were acquired by plaintiff by a single grant in 1910, the lot in question being described in a separate paragraph of the premises conveyed as described in the deed. For many years the assessors did not list on the tax rolls parcels whose owners were unknown and no taxes were levied against Lot No. 2. In 1974, for the first time, the property was listed "owner unknown". The taxes were not paid and in 1975 the county bought the lot, conveying it to defendant in 1977. Plaintiff, unaware it held title, bid at this sale, but was unsuccesful. The Appellate Division concluded that assessors are charged with the responsibility of ascertaining by "diligent inquiry" all real property in the district and the names of owners thereof (Real Property Tax Law, §500); that once identified, each parcel of property is placed upon the assessment roll with its assessment listed; that the tax is levied against the real property itself, not the owner, so that it is the identification of property on the roll that is important, not the name of the owner; that ownership is only one part of identification and absent a description so imperfect that identification of the property with any degree of certainty is impossible, error or omission in identifying the owner does not invalidate the levy or enforcement proceedings (Real Property Tax Law, §504, subd 4); that no constitutional due process requirement mandates personal notice; that subdivision 4 of section 1002 of the Real Property Tax Law provides only that notice be sent to the owner or occupant "as shown on the assessment roll", and that since the roll listed the owner as unknown, the statute imposes no additional duty on the assessor to investigate or determine ownership.

Lily Dale Assembly v. *County of Chautauqua*, 72 AD2d 950, affirmed. [Headnote omitted.]

APPEARANCES OF COUNSEL

Bruce K. Carpenter for appellant.

Philip A. Erickson for respondent.

Robert Abrams, Attorney-General (Stanley Fishman and *Shirley Adelson Siegel* of counsel), *pro se.*

OPINION OF THE COURT

Order affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (72 AD2d 950; see, also, Real Property Tax Law, §504, subd 4).

Concur: Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER.

JUDGMENT OF NEW YORK COURT OF APPEALS

Remittitur

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 53

Lily Dale Assembly, Inc.,

Appellant,

v.

The County of Chautauqua,

Defendant,

and

Gregory D. Josephson,

Respondent.

The appellant in the above entitled appeal appeared by Aular & Woodbury; the respondent appeared by Erickson, Webb & Scolton.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (72 AD2d 950; see also RPTL sec. 504 [subd. 4]). All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Chautauqua County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 12, 1981.

ADDITIONAL STATUTES INVOLVED

NEW YORK REAL PROPERTY TAX LAW

§ 502. *Form of assessment roll*

1. The form of the assessment roll shall be prescribed or approved by the state board, in accordance with the requirements contained in this section.

2. Provision shall be made with respect to each separately assessed parcel of real property for the entry, in appropriate columns, of the name of the owner, last known owner or reputed owner and a description sufficient to identify the same, including the surnames of the abutting property owners and the names of the abutting streets or highways, the approximate number of square feet, square rods or acres contained therein or a statement of the linear dimensions thereof. When a tax map has been approved by the state board, reference to the lot, block and section number or other identification numbers of any parcel on such map shall be deemed a sufficient description of such parcel.

3. The assessment roll shall contain a column for the entry with respect to each separately assessed parcel of the assessed valuation of the land exclusive of any improvements, followed by a column for the entry of the total assessed valuation. Only the total assessment, however, shall be subject to judicial review provided by article seven of this chapter.

4. Provision shall be made for the entry of assessments of special franchises in a separate part of the roll, together with the name of the owner and a description thereof sufficient to identify the same.

5. Provision shall be made for the entry of assessments of parcels of real property wholly exempt from taxation in a separate part of the roll. If a parcel of real property is partially exempt, it shall be entered with the taxable property, with the

amount of the exemption shown in a separate column. Property exempt from taxation in a limited amount shall be entered with the taxable property although the amount of the exemption equals the assessed valuation.

6. The form of assessment roll prescribed or approved for use in towns shall provide for the entry, in appropriate columns, of the name of the village, if in a village, the number of the school district and the name or number of any special district in which special ad valorem levies are made for district purposes, in which each parcel of real property and each special franchise described on such roll is situated, and shall also provide for the entry of apportionments of special franchise assessments made pursuant to section six hundred sixteen of this chapter and appropriate entries for parcels separately assessed for school district or special district purposes.

7. Provision shall also be made for the entry of the amount of taxes levied for county, city or town purposes and the amount of any special ad valorem levies imposed for special district purposes against each parcel of real property and each special franchise, together with the date of payment thereof and such other items and details as may be required.

§ 504. *Preparation of assessment roll*

1. The state board shall adopt rules and regulations for the preparation and use of the assessment roll and shall advise with and instruct assessors and other officers as to their duties with respect thereto. The assessors shall prepare the roll in the form prescribed or approved by the state board and in accordance with the rules and regulations adopted by such board relative thereto.

2. Where a parcel separately assessed for general municipal purposes lies partly within a special district or school district the portion within such special district or school district shall be separately assessed for special district or school district pur-

poses, as the case may be, except as otherwise provided by section thirteen hundred ten of this chapter.

3. Real property of a railroad company which has elected to have the provisions of title two-a of article four of this chapter apply to such company shall be assessed in accordance with the provisions of section four hundred eighty-nine-c of this chapter.

4. If in the preparation of the roll an error or omission is made in the description of a parcel of real property or in entering or failing to enter the name of the owner, last known owner or reputed owner, such error or omission shall not prevent the levy, collection and enforcement of the payment of the taxes thereon if the parcel can be identified and located with reasonable certainty.